

No. 1-12-2815

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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|---|---|---------------------|
| ERIC D. FREED, individually and derivatively on | ) | Appeal from         |
| behalf of FREED & WEISS LLC,                    | ) | the Circuit Court   |
|   | ) | of Cook County      |
| Plaintiff-Appellant,                            | ) |                     |
|   | ) |                     |
| v.  | ) | No. 11 CH 41529     |
|   | ) |                     |
| PAUL M. WEISS and JAMIE SALTZMAN WEISS,         | ) | Honorable           |
|   | ) | Kathleen M. Pantle, |
| Defendants-Appellees.                           | ) | Judge Presiding.    |

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JUSTICE PALMER delivered the judgment of the court.  
Presiding Justice Gordon and Justice McBride concurred in the judgment.

### ORDER

¶ 1 Held: The circuit court's order denying plaintiff's motion to compel arbitration and granting defendants' motion to enjoin arbitration on the basis that plaintiff waived his right to arbitrate is affirmed.

¶ 2 In this interlocutory appeal brought pursuant to Illinois Supreme Court Rule 307(a)(1) (eff. Feb. 26, 2010), plaintiff Eric D. Freed (Freed) seeks reversal of a circuit court order denying his motion to compel arbitration of an action he brought against defendants Paul M. Weiss (Weiss) and Jamie Saltzman Weiss (Saltzman) and granting defendants' motion to enjoin such arbitration. The court enjoined Freed from submitting to arbitration disputes arising under a partnership agreement he had with Weiss. Freed argues we should vacate the court's order denying his motion to compel and enjoining

him from pursuing arbitration because the court (1) had no jurisdiction to determine the arbitrability of the claims under the agreement, including any alleged waiver of his right to arbitrate and (2) erred in finding he had waived his right to arbitrate. We affirm.

¶ 3

### BACKGROUND

¶ 4 On August 2, 2000, Freed and Weiss entered into a partnership agreement (the agreement). The agreement served as the operating agreement regulating the affairs and business of Freed and Weiss LLC (F&W), a Chicago law firm, and governed the relationship between Freed and Weiss, the only two members of and partners in F&W. Freed owned 53% of the firm and Weiss 47%. Profits were to be split accordingly. Saltzman, Weiss's wife, was an employee of F&W. Section 29 of the agreement provides :

"In the event the parties are unable to reach agreement as to any dispute arising under this Partnership Agreement, the parties mutually agree to arbitrate any such dispute in Chicago, Illinois before any mutually agreeable tribunal, and in the absence of such agreement, the parties shall seek to arbitrate such dispute before the Chicago Bar Association ('CBA') according to its rules, but if the CBA will not agree to arbitrate such dispute, it shall be arbitrated before the American Arbitration Association according to its rules."

¶ 5 On March 20, 2011, without Weiss' knowledge, Freed withdrew \$1.5 million from F&W's general operating account. The next day, Weiss informed Freed that, because of the withdrawal, F&W did not have enough money to operate. Freed then made a

deposit of \$300,000 dollars to F&W's general operating account. On April 15, 2011, Weiss sent a letter to Freed "confirming" that, because of Freed's actions and pursuant to section 19 of the Agreement, Freed had voluntarily terminated his membership in F&W.<sup>1</sup>

¶ 6 On December 5, 2011, Weiss filed a claim for arbitration with the American Arbitration Association [the AAA].<sup>2</sup> Weiss sought a finding that Freed had voluntarily terminated his membership interest in F&W on March 20, 2011, and an award of compensatory damages up to \$1 million based on Freed's unlawful withdrawal of funds from F&W's account.

¶ 7 On the same day, Freed filed a "verified complaint for an accounting, appointment of a receiver and injunctive and other relief" (the complaint) on behalf of himself and F&W against defendants in the Chancery Division of the circuit court of Cook County. He alleged that defendants had breached their fiduciary duties by (1) diverting F&W's resources to pay for their personal expenses, (2) misappropriating F&W's assets to their own ends, such as to finance the start up of a new law firm and (3) misusing Freed's signature stamp. Freed sought (1) an accounting of F&W's

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<sup>1</sup> Section 19 of the partnership agreement provides: "Voluntary termination is defined as any act(s) or omission(s) which deliberately withholds the services of the terminating party from Freed & Weiss LLC without the prior written consent of the other party, either Eric D. Freed or Paul M. Weiss."

<sup>2</sup> Weiss' claim for arbitration asserted the AAA had jurisdiction over the disputes arising from the partnership agreement pursuant to section 29 of the agreement because the CBA "does not arbitrate disputes of this nature."

financial affairs to determine the funds that defendants had improperly diverted or taken and the return of those funds; (2) the appointment of a receiver to oversee F&W's affairs; (3) a temporary and permanent injunction to prevent defendants from controlling or transferring the assets and bank accounts of F&W, soliciting clients and settling cases without Freed's or the court's approval; (4) an order requiring defendants to preserve all books, papers, records, electronic files and other materials of F&W; (5) an award of attorney fees; and (6) other relief the court deemed appropriate.

¶ 8 On December 12, 2011, defendants filed an emergency motion to compel arbitration, contending that the arbitration clause of the agreement was valid and enforceable and, therefore, the court lacked jurisdiction to hear Freed's complaint. They asserted the threshold issues of the arbitrability of Freed's claims and whether Freed terminated his membership in F&W had to be arbitrated. They also asserted Freed's claims against Weiss for Weiss's misuse of F&W's assets had to be arbitrated. Defendants asked the court to order Freed to proceed to arbitration and either dismiss Freed's complaint or stay the proceedings pending arbitration of the disputes arising under the agreement.

¶ 9 Freed opposed defendants' motion to compel arbitration, arguing that the motion should be denied because his claims involved parties, F&W and Saltzman, who were not signatories on the agreement and, therefore, not subject to the arbitration clause in the agreement. He asserted that nothing in the agreement could, therefore, compel Freed to arbitrate his claims against Saltzman or compel F&W to arbitrate its claims

against either defendant. Freed also argued that his claims against Weiss for breach of fiduciary duty for misuse of F&W's funds and assets arose under the Illinois Limited Liability Company Act (805 ILCS 180/1-1 *et seq.* (West 2010)) (the LLC Act) rather than the agreement because the agreement was silent on what constitutes misuse of F&W's funds. He asserted those claims against Weiss were, therefore, governed by the LLC Act and not the partnership agreement.

¶ 10 On January 3, 2012, F&W sent a letter to the AAA informing it that F&W was a party plaintiff in litigation before the circuit court, "wherein some (but not all) of the facts and legal concerns are also at issue in the recently filed AAA arbitration." F&W asserted that Weiss did not have the authority to name and include F&W as a party claimant in the AAA proceedings because Freed held the controlling 53% interest in the partnership and also because F&W was not a signatory to the arbitration agreement between Weiss and Freed. F&W, therefore, objected to the AAA's jurisdiction over F&W and to any arbitration proceeding wherein F&W was a named claimant. In a January 4, 2012, letter, Freed raised a similar concern with the AAA, informing it that, as the majority owner of F&W, he objected to inclusion of F&W in the AAA proceedings. He requested the AAA stay the arbitration pending the outcome of the court proceeding.

¶ 11 On January 11, 2012, Freed filed an "emergency motion for a preliminary injunction." He asserted that defendants, on behalf of F&W, had signed a lease and intended to move F&W from its offices in Chicago to Highland Park, Illinois. He further

asserted that defendants had changed F&W's name to Complex Litigation Group LLC (CLG), established Weiss as the sole owner of the firm and changed the lock of the offices, thus preventing Freed from entering and managing the firm. He requested the court to (1) prevent defendants from changing the name, address, and articles of organization of F&W; (2) order defendants to deposit all legal fees received from clients into an account on which the joint signatures of Freed and Weiss would be required to withdraw funds; (3) grant Freed access to F&W's premises and computer systems; and (4) allow Freed to reassume his duties as manager of F&W.

¶ 12 On January 17, 2012, Weiss and CLG filed an "emergency petition to enjoin and expel" Freed. They stated that F&W had changed its name to CLG on December 22, 2011. They requested, "in the alternative to Weiss' AAA Complaint," that the court make a judicial determination that Freed was expelled as a member of CLG and a preliminary and permanent injunction enjoining Freed from acting as or representing himself as a member or manager of CLG or F&W. They claimed that Freed's membership in CLG, the former F&W, had terminated under the operating agreement because he had deliberately withheld his services from CLG and, by virtue of his having withdrawn and retained \$1.2 million of CLG's funds, he had received the termination payment due under the agreement.

¶ 13 On January 18, 2012, Freed filed an amended verified complaint on behalf of

himself and F&W against defendants.<sup>3</sup> In count I, he asserted that Weiss breached his fiduciary duties to Freed and F&W by wrongfully excluding Freed from F&W's offices, computers and bank accounts, attempting to move F&W's offices and computer system from downtown Chicago to Highland Park and attempting to force Freed out of his position as manager of the firm. He also asserted Weiss breached his fiduciary duty by using F&W's assets to pay for his personal expenses, misappropriating F&W's assets, withdrawing 100% of F&W's profits, forging Freed's signature on a lease extension, negotiating fee settlements at a fraction of the fee demand without Freed's approval and engaging in sexual misconduct that sullied the reputation of F&W.

¶ 14 In Count II, Freed asserted that Saltzman breached the duty of loyalty that she owed to F&W as an employee by abusing her signatory authority over F&W's bank accounts, transferring \$100,000 of F&W's assets to pay for a lease entered into by a fictitious limited liability company, aiding in the conversion of F&W's assets to pay for defendants' personal expenses, and aiding in the transfer of F&W's offices and computer system. In count III, Freed alleged that Weiss breached the partnership agreement by preventing reimbursement of Freed's capital contributions and advances of expenses to F&W and seizing 100% of the profits of F&W, thereby preventing Freed from receiving his share of the profits. In Count IV, Freed contended that defendants converted F&W's assets by transferring all of its funds to bank accounts over which they

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<sup>3</sup> The amended complaint names Freed "and [F&W]" as "plaintiffs." However, the original complaint named Freed, "individually and derivatively on behalf of" F&W as "plaintiff." We retain the original designation of the parties. Freed is the only appellant.

had sole control and using the funds to pay for personal expenses and buy real estate. In counts I through IV, Freed sought compensatory damages, punitive damages, attorney fees and costs.

¶ 15 In count V, Freed sought a declaratory judgment that Weiss, by his actions, had voluntarily terminated his membership in or had withdrawn from F&W pursuant to paragraph 19 of the agreement. In count VI, he sought preliminary and permanent injunctive relief preventing defendants from amending F&W's articles of organization, changing F&W's name, withdrawing F&W's funds without Freed's consent, denying Freed physical access to F&W's offices, moving F&W's offices and preventing Freed from assuming his duties as manager of F&W. In count VII, Freed sought the appointment of a receiver to manage and direct the operations of F&W. In count VIII, he requested an order requiring an accounting to determine the amounts that have been improperly used by defendants.

¶ 16 On January 20, 2012, Freed sent the AAA a letter notifying it that Weiss had filed the emergency petition to expel Freed as a member of F&W and enjoin him from acting as a member or manager of F&W. He asserted that Weiss was seeking the same relief in court as he sought from the AAA: a declaration that Freed no longer had an interest in F&W. Freed requested that the AAA dismiss the arbitration proceeding. He argued that Weiss, by bringing the court action, had waived his right to arbitrate his claims against Freed and made it clear he no longer wished to resolve his dispute with Freed outside court. On January 26, 2012, Freed notified the AAA by email that he intended to file a



motion with the court to enjoin the AAA from proceeding with the arbitration.

¶ 17 On January 26, 2012, following a hearing, the court ordered Weiss to allow Freed's computer expert to work together with defendants' consultant to coordinate the move of F&W's computer system and ordered defendants to grant Freed real time access to view the activity in F&W's bank accounts and access to F&W's physical office space and client files. The court denied all other preliminary relief requested by Freed.

¶ 18 Over the next several months, defendants filed three emergency petitions seeking relief under the LLC Act as an alternative to relief sought with the AAA. Freed filed a number of motions asking the court to appoint an interim operating receiver, preclude Weiss from withdrawing Freed's appearances on F&W's pending class action law suits, afford relief for Weiss' failure to comply with the court's orders and prevent defendants from using F&W's funds to pay for their attorney fees. Freed issued document requests and interrogatories to defendants and third parties and took depositions of three third parties. The court held hearings, ruled on some of the motions and continued others.

¶ 19 On May 12, 2012, Freed filed a "notice" withdrawing his opposition to defendants' motion to compel arbitration and stipulating to the relief requested. He requested a stay of all litigation pending arbitration of the disputes arising under the agreement. Freed asserted that all the claims and allegations in the chancery case were arbitrable under paragraph 29 of the agreement. He also asserted that, in the event that some of the claims and allegations were non-arbitrable, they arose from matters related to the agreement and, therefore, required a stay under the FAA.

¶ 20 On May 22, 2012, Freed filed his answering statement and counterclaim against Weiss before the AAA. He denied that he voluntarily terminated the partnership agreement. As to the counterclaim, in count I, Freed alleged that Weiss breached the partnership agreement by improperly taking funds from F&W, dissipating F&W's operating funds and preventing F&W from repaying loans made by Freed to F&W. In count II, he alleged that Weiss violated his fiduciary duty to Freed and F&W by, *inter alia*, misappropriating F&W's funds, using F&W's funds to pay for personal expenses and withdrawing 100% of F&W's profits. He also asserted Weiss wrongfully excluded Freed from the premises, computer system and bank accounts, forged Freed's name, forced Freed out of his position as manager and member of F&W and negotiated fee settlements at fraction of the fee value without Freed's approval. In count III, Freed alleged that Weiss had breached his fiduciary duty to Freed and F&W when he opened a competing firm. Freed requested compensatory damages, punitive damages, attorney fees and costs in counts I through III. In count IV, Freed sought a declaratory judgment that Weiss had voluntarily terminated the partnership agreement by his actions in breaching the agreement and his fiduciary duty and that Freed had not. In count V, he sought, in the alternative, the disassociation of Weiss from F&W on the same basis.

¶ 21 During a hearing before the court on May 23, 2012, defendants orally moved to withdraw their motion to compel arbitration. The court granted defendants' motion to withdraw their motion and declared Freed's motion to withdraw his opposition to the motion to compel arbitration moot.

¶ 22 On June 6, 2012, Freed filed a motion to compel arbitration and stay the case pending completion of the arbitration proceeding. He asserted that the agreement was the cornerstone of the case and every dispute and issue arose from and traced back to the parties' respective rights and duties under the agreement.

¶ 23 Defendants filed an emergency motion to enjoin Freed, his lawyers and the AAA from proceeding with arbitration until the court ruled on Freed's motion to compel arbitration, asserting Freed waived his right to arbitrate. The court granted a temporary restraining order enjoining Freed, his lawyers and the AAA from proceeding with arbitration.

¶ 24 In an August 21, 2012, letter, Freed notified F&W and Weiss that he was withdrawing and disassociating from F&W but intended to reserve and enforce all his rights and remedies as a former member and disassociated member of F&W under the LLC Act and other governing law. He sought a purchase offer for his shares and, in the event such was not forthcoming, dissolution of F&W. He also notified Weiss that he was filing a federal complaint charging Weiss with theft of Freed and F&W's funds and assorted other improprieties and intended to seek dissolution of F&W upon a judicial verdict in his favor.

¶ 25 Freed then filed a federal action against Weiss, Weiss's father and CLG "f/k/a [F&W]" in the U.S. District Court for the Northern District of Illinois asserting assorted claims, including claims for breach of contract and fiduciary duty, and seeking dissolution of F&W and damages.

¶ 26 On August 21, 2012, Freed filed a motion to voluntarily dismiss his circuit court action without prejudice. During an August 22, 2012, hearing, the court agreed with Freed's request that the court decide the arbitrability and waiver issues raised in his motion to compel and defendants' motion to enjoin arbitration prior to addressing his motion for voluntary dismissal and set September 4, 2012, for its decision from the bench.

¶ 27 On September 4, 2012, the circuit court entered an order denying Freed's motion to compel arbitration and granting defendants' motion to enjoin arbitration. The court summarized case law regarding the determination of waiver of the right to arbitrate, recognizing that it was defendants' "heavy burden" to prove Freed waived his right to arbitrate and that there is a presumption against such waiver. Turning to the elements to be considered in a waiver determination, the court found Freed waived his right to arbitrate by acting "entirely inconsistently" with his right to arbitrate and causing prejudice to defendants as a result.

¶ 28 The court found Freed acted inconsistently with his right to arbitrate by submitting substantive and arbitrable issues to the court, thus demonstrating an intent to proceed with litigation to the exclusion of arbitration. It found Freed was clearly aware of his right to arbitrate given that defendants had requested AAA arbitration shortly before Freed filed his complaint and Freed, a successful attorney, knew what he signed when he executed the partnership agreement. The court stated Freed filed the instant suit on arbitrable claims and was seeking permanent injunctive relief, "not merely trying to

maintain the *status quo* pending arbitration." It stated Freed had never requested the court to stay proceedings pending his assertion of his right to arbitrate, sought extensive discovery not available in arbitration and issued "expansive document requests, interrogatories, depositions, subpoenas to third parties, all sorts of matter that he would not be able to get in arbitration."

¶ 29 The court found Freed manifested that he did not intend to arbitrate by his initial opposition to defendants' motion to compel arbitration, asserted on the basis that the arbitration provision did not apply to his claims against Weiss, the other party to the agreement. The court also pointed to Freed's letters to the AAA variously objecting to arbitration and demanding that the AAA return the filing fee paid by F&W, Freed's five appeals from the court's orders and his failure to assert the arbitration clause in the face of defendants' counterclaims as further proof that he acted inconsistently with his right to arbitrate.

¶ 30 With regard to prejudice to defendants, the court stated:

"The costs here have been tremendously extensive, and I can say that for surety [*sic*], given the number of times that the parties have been before the court, how many times Mr. Freed has dragged the defendants into court, how many times they've had to file emergency motions and things of that nature because of Mr. Freed's behavior, \*\*\* I know the costs have been extensive, that the defendants have paid a lot because Mr. Freed chose to come to court rather than going to arbitration. These costs include preparation for hearings, responding to motions,

\*\*\* responding to matters that would not have been part of arbitration.

\*\*\* [T]o me, that's very prejudicial."

The court also noted that defendants were prejudiced by the fact that the case had gone on for almost "nine full months," thus defeating one purpose of arbitration, timeliness of resolution. Overall, the court found the prejudice to defendants "enormous." It held that Freed was forum shopping, "he never intended to invoke the arbitration clause" and "by his conduct, he has clearly and absolutely waived his right to arbitration." It barred Freed, his lawyers and the AAA from proceeding with arbitration of Freed's claims.

¶ 31 On September 24, 2012, Freed filed a timely notice of interlocutory appeal from the court's order.

¶ 32 ANALYSIS

¶ 33 1. Standard of Review

¶ 34 Freed argues that the circuit court erred in denying his motion to compel arbitration and granting defendants' motion to enjoin arbitration because the court (1) lacked jurisdiction to determine the arbitrability of Freed's claims, including the question of whether he waived his right to arbitrate those claims and (2) erred in finding that he had waived his right to arbitrate disputes arising under the agreement. This court has jurisdiction to review the court's order denying Freed's motion to compel arbitration and granting defendant's motion to enjoin arbitration, pursuant to Illinois Supreme Court Rule 307(a)(1) (eff. Feb. 26, 2010). *Bovay v. Sears, Roebuck and Co.*, 2013 IL App (1st)

120789, ¶24.<sup>4</sup>

¶ 35 The parties disagree regarding the proper standard of review for this interlocutory appeal. Freed maintains the standard of review is *de novo* or clearly erroneous, depending on whether the circuit court's order under consideration involved legal or factual findings. Defendants contend that the standard of review is abuse of discretion.

¶ 36 "[T]he standard applied to an interlocutory appeal of a denial of a motion to compel arbitration is ultimately dictated by the nature of the issue decided." *Brown v. Delfre*, 2012 IL App (2d) 111086, ¶ 10. "[I]n interlocutory appeals of orders denying a motion to compel arbitration, questions of law are reviewed *de novo*, while any findings of fact are reviewed for an abuse of discretion in light of a proper understanding of the law." *Bovay*, 2013 IL App (1st) 120789, ¶26. Freed's first issue, whether the court had jurisdiction to decide arbitrability and/or waiver, presents a question of law that we review *de novo*. *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 294 (2010) ("An argument challenging the subject matter jurisdiction of the circuit court presents a question of law that this court will review *de novo*"). His second issue, whether the court erred in finding he waived arbitration, presents a question of fact that we review under the abuse of discretion standard. *Glazer's Distribution of Illinois, Inc. v. NWS-Illinois, LLC*, 376 Ill. App. 3d 411, 423-424 (2007); *Schroeder Murchie Laya Associates, Ltd. v.*

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<sup>4</sup> Pursuant to Supreme Court Rule 307(a)(1) (eff. Feb. 26, 2010), a party can appeal an interlocutory order granting, modifying, refusing, dissolving or refusing to dissolve or modify an injunction. *Bishop v. We Care Hair Development Corp.*, 316 Ill. App. 3d 1182, 1189 (2000). "A motion to compel arbitration is analogous to a motion for injunctive relief." *Id.*

*1000 West Lofts, LLC*, 319 Ill. App. 3d 1089, 1093-94 (2001) ("the trial court must necessarily engage in a factual inquiry to determine if a plaintiff's actions constitute waiver").

¶ 37 The parties agree that the Federal Arbitration Act (9 U.S.C. § 1 *et. seq.* (2000)) (the FAA) governs the enforceability of the arbitration clause in the partnership agreement. "The FAA governs the enforceability of arbitration agreements in contracts involving interstate commerce." *Bovay*, 2013 IL App (1st) 120789, ¶28.<sup>5</sup> "Where a contract involving interstate commerce contains an arbitration clause, federal law preempts state statutes even in state courts," except where the parties to the contract have specifically agreed to arbitrate in accordance with state law. *Bishop*, 316 Ill. App. 3d at 1190-191; *Glazer's Distribution of Illinois, Inc.*, 376 Ill. App. 3d at 421. The partnership agreement here contains no choice of law provision, let alone one specifically incorporating Illinois state arbitration rules into the arbitration agreement. Accordingly, federal law governs the enforceability of the arbitration clause in the agreement.

¶ 38 2. Circuit Court's Jurisdiction

¶ 39 Freed first contends that the court lacked jurisdiction to determine the arbitrability of the claims he presented in court, including the question of whether he waived his right to arbitrate. As noted above, we review this issue *de novo*. The *de novo* standard of

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<sup>5</sup> In this regard, the record reflects that F&W, the law firm underlying the partnership agreement, was a class action law firm with cases pending throughout the United States.



review means "we perform the same analysis as a trial judge would perform." *Bovay*, 2013 IL App (1st) 120789, ¶26. We find that the court had jurisdiction to consider whether Freed waived his right to arbitrate.

¶ 40 Defendants had argued that Freed waived his right to arbitrate through his initiation of the circuit court action, conduct during the trial proceedings and active opposition to defendants' motion to compel arbitration. "[W]aiver of the right to arbitrate based [as here] on litigation conduct remains presumptively an issue for the court to decide." *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 221 (3d Cir. 2007).

¶ 41 We recognize that, in *Howsan v. Dean Witter Reynolds*, 537 U.S. 79 (2002), the Supreme Court "admittedly refer[red]] to 'waiver' as a procedural issue for the arbitrator to decide." *Ford Motor Credit Co. v. Cornfield*, 395 Ill. App. 3d 896, 911 (2009) (citing *Howsam*, 537 U.S. at 84). "However, the majority of federal appellate courts that have considered this issue have concluded that the *Howsam* Court's use of the term 'waiver' referred to a party's lack of compliance with contractual conditions precedent to arbitration, rather than, [as here,] waiver based on prior litigation or conduct inconsistent with the right to arbitrate, which has traditionally been ruled upon by the court." *Ford Motor Credit Co.*, 395 Ill. App. 3d at 911 (citing *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 393–94 (6th Cir. 2008); *Ehleiter*, 482 F.3d at 217–19; *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 14 (1st Cir. 2005)). Having reviewed *Howsam*, we agree that *Howsam* does not address the type of waiver at issue here.

¶ 42 Freed asserts that, under the agreement, arbitrability and waiver issues should be

decided by the arbitrator because the partnership agreement provides that disputes arising under the agreement "shall be arbitrated before the American Arbitration Association according to its rules." He points out that AAA Rule 7(a) provides that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement."

¶ 43 The agreement's "catch-all" provision incorporating the AAA rules "does not include the question of the effect of a party's prior litigation, which the circuit court is better qualified to determine than the arbitrator." *Ford Motor Credit Co.*, 395 Ill. App. 3d at 911. Accordingly, the circuit court had jurisdiction to consider the waiver issue.

¶ 44 3. Waiver

¶ 45 Having determined that the circuit court had jurisdiction to consider whether Freed waived his right to arbitrate, we turn to Freed's contention that the court erred in finding that he waived his right to arbitrate. Freed argues (a) the "no waiver" provision of the AAA rules was part of the partnership agreement and, therefore, barred a waiver finding, (b) defendants failed to prove that he acted inconsistently with his right to arbitrate and (c) defendants failed to prove they were prejudiced by his delay in seeking arbitration.

¶ 46 " 'Although the FAA favors the enforcement of private arbitration agreements, [citation], the court may refuse to enforce an arbitration agreement on the ground that the party seeking enforcement has waived such right.' " *Bovay*, 2013 IL App (1st) 120789, ¶ 28 (quoting *In re Toyota Motor Corp. Hybrid Brake Marketing, Sales, Practices & Products Liability Litigation*, 828 F. Supp. 2d 1150, 1162 (C.D. Cal. 2011)).

A contractual right to compel arbitration may be waived like any other contractual right. *Ford Motor Credit Co.*, 395 Ill. App. 3d at 912. "Nevertheless, 'as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.'" *Bovay*, 2013 IL App (1st) 120789, ¶ 28 (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983)).

¶ 47 (a) The AAA Rule 48(a) "No Waiver" Provision

¶ 48 Freed first contends that, because the parties had incorporated AAA Rule 48(a) into the partnership agreement, the court erred in finding that he waived his right to arbitrate by engaging in litigation. Rule 48(a) states: "No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate."

¶ 49 AAA Rule 48(a) does not preclude a finding of waiver. Rule 48(a) is "just one factor to be considered in determining if prior participation in litigation amounts to a waiver of the right to arbitrate." *State Farm Mutual Automobile Insurance Co. v. George Hyman Construction Co.*, 306 Ill. App. 3d 874, 884 (1999) (considering the identical "no waiver" provision stated in Rule 48(a) of the AAA Construction Industry Arbitration Rules). "The parties cannot, by agreement, frustrate the inherent power of a court to bind litigants to their former actions." *Id.* " '[T]he presence of a "no waiver" clause does not alter the ordinary analysis undertaken to determine if a party has waived its right to

arbitration.' " *Gray Holdco, Inc. v. Cassady*, 654 F.3d 444, 452 (3d Cir. 2011) (quoting *S&R Co. of Kingston v. Latona Trucking, Inc.*, 159 F.3d 80, 86 (2d Cir. 1998) (considering the identical AAA no waiver rule at issue here)). "[A] party should not be allowed to delay its demand for arbitration and use \*\*\* court proceedings to ' "test[ ] the water before taking [a] swim." ' " *Gray Holdco, Inc.*, 654 F.3d at 453 (quoting *S&R Co. Of Kingston*, 159 F.3d at 86 (quoting *Home Gas Corp. of Massachusetts, Inc. v. Walter's of Hadley, Inc.*, 403 Mass. 772, 532 N.E.2d 681, 685 (1989)) (first alteration in original)). Accordingly, the incorporation of AAA Rule 48(a) into the partnership agreement does not prevent the court from finding Freed waived his right to arbitration.

¶ 50 (b) Actions Inconsistent with Right to Arbitrate

¶ 51 Freed next argues that the court erred in finding that he waived his right to arbitrate because defendants failed to prove that he acted inconsistently with his right to arbitrate. Federal courts have employed a variety of overlapping approaches to consider the issue of waiver of the right to arbitrate. *Bovay*, 2013 IL App (1st) 120789, ¶ 29 (and cases cited therein). Freed adopts the approach taken by the court in *LAS, Inc. v. Mini-Tankers, USA, Inc.*, 342 Ill. App. 3d 997 (2003), in which the parties had agreed, as here, that all issues relating to the arbitrability of disputes or enforceability of the arbitration clauses in the parties' agreement were governed by federal law. The *LAS* court held:

"[t]he majority of federal cases are consistent in their holdings with respect to a party's waiver of its right to arbitration. The party asserting waiver bears a heavy

burden of proof to show that the party seeking arbitration had knowledge of its existing right to compel arbitration but acted inconsistently with that right and that the party asserting waiver suffered prejudice as a result of the alleged waiver.

[Citations.] Thus, waiver will be found when the party seeking arbitration substantially invokes the judicial process and substantially participates in litigation to a point inconsistent with an intent to arbitrate, to the detriment or prejudice of the other party." *LAS*, 342 Ill. App. 3d at 1002.

¶ 52 Defendants have not urged this court to adopt an alternative approach and, in their response, address the *LAS* factors raised by Freed. Given that the *LAS* approach is consistent with federal law and sufficiently broad for our consideration of the question of whether Freed waived his right to arbitrate, we use the factors stated therein to determine whether the circuit court abused its discretion in finding that Freed waived his right to arbitrate. Accordingly, defendants had the "heavy burden" to show that: (1) Freed had knowledge of his existing right to compel arbitration but acted inconsistently with that right and (2) defendants suffered prejudice as a result of the alleged waiver. *LAS*, 342 Ill. App. 3d at 1002.

¶ 53 As noted above, the question of whether the court erred in finding Freed waived arbitration presents a question of fact that we review under the abuse of discretion standard. *Glazer's Distribution of Illinois, Inc.*, 376 Ill. App. 3d at 423-424; *Schroeder Murchie Laya Associates, Ltd.*, 319 Ill. App. 3d at 1093-94. An abuse of discretion occurs when the circuit court's ruling is "arbitrary, fanciful, or unreasonable, or when no

reasonable person would take the same view.” *Bovay*, 2013 IL App (1st) 120789, ¶26.

¶ 54 Freed does not claim he was unaware of his right to arbitrate his disputes but challenges the court's finding that he acted inconsistently with that right to arbitrate.

" 'A party acts inconsistently with its right to arbitrate if the party substantially invokes the litigation machinery before asserting its arbitration right.' [Citation.] 'A party substantially invokes the litigation machinery when, for example, it files a lawsuit on arbitrable claims, engages in extensive discovery, or fails to move to compel arbitration and stay litigation in a timely manner.' [Citation.] 'To safeguard its right to arbitration, a party must "do all it could reasonably have been expected to do to make the earliest feasible determination of whether to proceed judicially or by arbitration." ' [Citations.]" *ABF Freight System, Inc. v. International Brotherhood of Teamsters*, 728 F.3d 853, 862 (8th Cir. 2013).

¶ 55 The record supports the circuit court's findings that Freed acted inconsistently with his right to arbitrate by filing court claims not limited to interim relief pending arbitration, opposing defendants' motion to compel arbitration and failing to assert the arbitration clause in regard to defendants' counterclaims. It shows that Freed sought more than interim injunctive relief by seeking (1) a declaratory judgment establishing that Weiss had voluntarily withdrawn from F&W, (2) permanent injunctive relief and (3) awards for compensatory and punitive damages. The record also shows that Freed participated in extensive litigation not available in arbitration, such as issuing interrogatories and deposing witnesses. It shows he actively opposed defendants'

motion to compel arbitration and failed to object to the litigation of defendants' counterclaims, which clearly asserted claims arising under the agreement. It shows he sought dismissal of the arbitration proceeding from the AAA.

¶ 56 Freed makes the unsupported assertion that he strictly sought interim equitable relief to preserve the *status quo* pending arbitration. He does not direct us to anything in the record that shows that he informed the court at any point prior to defendants' withdrawal of their motion to compel arbitration that he intended to arbitrate all issues arising under the agreement. Indeed, the circuit court specifically found that Freed was "not merely trying to maintain the *status quo* pending arbitration" and that he never requested the court to stay proceedings pending his assertion of his right to arbitrate. The circuit court clearly was in the best position to make the factual determination regarding whether Freed acted inconsistently with his right to compel arbitration. The court presided over all proceedings between the parties. Based on all it observed, the court determined that Freed acted inconsistently with his right to arbitrate and the record bears this out. The court's finding that Freed acted inconsistently with his right to arbitrate was entirely reasonable and not an abuse of the court's discretion.

¶ 57 (c) Prejudice

¶ 58 Freed lastly argues that the court erred in finding defendants were prejudiced by his delay in asserting his right to arbitrate. Federal courts generally consider the following factors in determining whether the party claiming waiver was prejudiced by delay:

" '(1) timeliness or lack thereof of the motion to arbitrate; (2) extent to which the party seeking arbitration has contested the merits of the opposing party's claims; (3) whether the party seeking arbitration informed its adversary of its intent to pursue arbitration prior to seeking to enjoin the court proceedings; (4) the extent to which a party seeking arbitration engaged in non-merits motion practice; (5) the party's acquiescence to the court's pretrial orders; and (6) the extent to which the parties have engaged in discovery.' " *In re Pharmacy Benefit Managers Antitrust Litigation*, 700 F.3d 109, 117 (3d Cir. 2012) (quoting *Gray Holdco*, 654 F.3d at 451 (citing *Hoxworth v. Blinder, Robinson & Co., Inc.*, 980 F.2d 912, 926–27 (3d Cir.1992))); *Bovay*, 2013 IL App (1st) 120789, ¶ 62.

These are nonexclusive factors and need not all be present to justify a finding of waiver. *In re Pharmacy Benefit Managers Antitrust Litigation*, 700 F.3d at 118. Instead, the waiver determination must be based on the context and circumstances of the particular case. *In re Pharmacy Benefit Managers Antitrust Litigation*, 700 F.3d at 118.

¶ 59 Here, the record establishes that Freed filed his motion to compel arbitration some eight months after he filed his complaint. Freed's complaint contested the merits of claims arising under the agreement and was not merely filed in order to seek interim relief. The record shows that Freed not only failed to inform defendants and the court that he intended to arbitrate disputes arising under the agreement but that he filed a motion in opposition to defendants' motion to compel arbitration. Instead of moving to arbitrate defendants counterclaims, Freed actively addressed them. The parties



participated in numerous hearings, filed and responded to motions, engaged in discovery regarding the merits of the issues, brought in witnesses and went so far as to prepare for trial. Only when defendants withdrew their motion to compel arbitration, some eight months after Freed first filed his complaint, did Freed move to compel arbitration. Indeed, the circuit court stated its "surprise" at this development given the extensive litigation that had already occurred.

¶ 60 Prejudice needed to show waiver extends to the prejudice resulting from the unnecessary delay and expense incurred by one party as a result of the other party's belated invocation of its right to arbitrate. *In re Pharmacy Benefit Managers Antitrust Litigation*, 700 F.3d at 121. There are circumstances in which we can infer that the party claiming waiver has invested considerable time and expenses in litigating a court case and would be required to duplicate its efforts if the case were subsequently to proceed in arbitration. *Id.* " 'In other words, the investment of considerable time and money litigating a case may amount to sufficient prejudice to bar a later-asserted right to arbitrate.' " *Id.* (quoting *Nino v. Jewelry Exchange, Inc.*, 609 F.3d 191, 209 (3d Cir. 2010)).

¶ 61 Given this record, such an "investment of considerable time and money litigating a case" can be inferred here. As the circuit court found, as a result of Freed's active litigation of his claims, his opposition to defendants' motion to compel arbitration and his belated filing of a motion to compel arbitration, the parties necessarily expended a substantial amount of time, preparation, money and resources in litigating this matter.

Therefore, the court's finding that defendants suffered prejudice as a result of Freed's trial conduct and belated invocation of his right to arbitrate was entirely reasonable and not an abuse of the court's discretion.

¶ 62 In sum, the record amply supports the court's conclusion that Freed waived his right to arbitration by acting inconsistently with his known right to arbitrate and caused prejudice to defendants by actively litigating the case, opposing defendants' motion to compel arbitration and delaying in pursuing his right to arbitrate. The court did not abuse its discretion in finding Freed waived his right to arbitrate. We affirm the court's order enjoining Freed from arbitrating his claims.

¶ 63 Conclusion

¶ 64 For the foregoing reasons, we affirm the decision of the circuit court denying Freed's motion to compel arbitration and granting defendants' motion to enjoin Freed from pursuing arbitration of his claims arising under the agreement.

¶ 65 We deny defendants' two motions to take judicial notice of assorted documents.<sup>6</sup>

¶ 66 We deny Freed's motion to strike defendants' appellate brief.<sup>7</sup>

¶ 67 Affirmed.

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<sup>6</sup> Defendants filed their first motion to take judicial notice on May 3, 2013. We took the motion with the case on May 16, 2013. Defendants filed their second motion to take judicial notice on October 15, 2013.

<sup>7</sup> Freed filed his motion on May 13, 2013. We took the motion with the case on May 16, 2013.